87-34

No. 87-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

FERDINAND E. MARCOS
and
IMELDA R. MARCOS,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the immunity accorded by U.S. courts to a former head of a foreign state may be waived by a successor government of the foreign state.

2. Whether the Executive can, through the use of a sole Executive agreement, by-pass federal legislation that entitles the witness to the privileges available under the laws of a foreign country when that country seeks the assistance of U.S. courts in obtaining documents produced by the witness.

3. Whether a fear of foreign prosecution, founded upon the actual filing of criminal charges in a foreign country, is sufficient to invoke the privilege against self-incrimination provided by the Fifth Amendment to the U.S. Constitution.

4. Whether the Court of Appeals applied an incorrect constitutional standard in holding that the U.S. Government would be engaged in a "joint venture" with a foreign prosecution (which would trigger Fifth Amendment protections) only where the foreign prosecution is "inspired, instigated or controlled" by the U.S. Government.

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Petitioners Ferdinand E. Marcos and Imelda R. Marcos respectfully pray that a writ of certiorari issue to review the decision and judgment of the Court of Appeals for the Fourth Circuit entered in this case on May 5, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals, affirming the decision of the District Court, is reported at —— F.2d —— and is reproduced in the Appendix at 1a. The unreported opinion of the District Court for the Eastern District of Virginia (Hilton, J.) appears in the Appendix at 11a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 5, 1987. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution Amendment V:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

STATUTE INVOLVED

This case involves 28 U.S.C. § 1782, which is set forth in the Appendix at 14a.

EXECUTIVE AGREEMENT INVOLVED

This case involves the Agreement on Procedures for Mutual Legal Assistance, June 11, 1986, United States-Republic of the Philippines, which is reprinted in the Appendix at 15a.

STATEMENT OF THE CASE

Petitioner Ferdinand E. Marcos is the former President of the Republic of the Philippines. Imelda R. Marcos is his wife. On February 26, 1986, President and Mrs. Marcos, along with members of their entourage, were brought to the United States by U.S. military aircraft. The removal of President Marcos from the Phlippines marked the culmination of a highly publicized series of events which led to the overthrow of the Marcos government and the installation of Corazon Aquino as the new President of the Philippines.

The U.S. Government moved quickly to assist the new Philippine government in its efforts to investigate and prosecute former President Marcos, his family, and his associates. Upon arrival of the Marcos party in Hawaii, the Customs Service impounded property (including currency and jewelry) brought in with President Marcos and his entourage, based on a claim of ownership by the new Philippine government. Customs refused to release the property, and that refusal has been judicially upheld.

Azurin v. von Raab, 803 F.2d 993 (9th Cir. 1986), *cert. denied*, —— S. Ct. —— (1987).

Soon after the Marcos' arrival in Hawaii, the Aquino government requested copies of documents that had been brought to Hawaii with the Marcos party and detained by the Customs Service. According to public statements made by Michael H. Armacost, former U.S. Ambassador to the Philippines and U.S. Under Secretary of State for Political Affairs, the request was made for "law enforcement" purposes of the new Philippine government. His declaration in a civil suit involving President Marcos states:

> It would be injurious to the foreign-policy interests of the United States generally as well as in this case were the President and his authorized agents for the conduct of foreign policy and law enforcement to be unable to provide relevant and appropriate law enforcement information to a friendly foreign government in accord with international law practice and comity.

Declaration of Michael H. Armacost, dated March 15, 1986.

On March 19, 1986, pursuant to this request, the U.S. Government provided copies of these documents to the Philippine government. Shortly thereafter, the Solicitor General of the Philippines filed criminal charges against President Marcos, his wife, and other individuals associated with the President, under the Penal Code of the Philippines. The Amended Complaint charges defendants with the crimes of conspiracy and violations of the Anti-Graft and Corrupt Practices Act, and violations of Articles 210-221 of the Philippine Penal Code. Petitioners and their co-defendants are charged with having obtained unlawful profits by taking undue advantage of their position and authority; with misappropriating foreign military and/or economic aid funds; with receiving kickbacks from companies doing business with the government; and with creating agricultural, industrial and commercial monopolies for their personal benefit.

In December 1986, Petitioners received subpoenas *duces tecum* and *ad testificandum* issued by a grand jury in the Eastern District of Virginia. The grand jury is investigating possible corruption in U.S. arms contracts with the Philippines, including the possibility of the payment of illegal kickbacks.[1] The subjects comprising the grand jury investigation are "congruent" with the criminal charges brought against Petitioners in the Philippines. *United States v. Under Seal (Araneta)*, 794 F.2d 920, 924 (4th Cir.), *cert. denied*, 107 S. Ct. 331 (1986). It is undisputed that the documents sought by the grand jury, or evidence derived from these documents, would be relevant and useful to the pending Philippine prosecution.

On June 11, 1986, as part of the continuing effort of the two countries to cooperate in the criminal investigations of President Marcos and his associates, the United States and the Philippines entered into an international agreement ("Mutual Assistance Agreement") to secure mutual legal assistance with respect to the criminal investigations ongoing in both countries. Agreement on Procedures for Mutual Legal Assistance, June 11, 1986,— U.S.T.—, T.I.A.S.—. *See* 15a, *infra*. The Mutual Assistance Agreement commits the two signatories to share evidence in the investigations of certain corporations and individuals alleged to have provided kickbacks to obtain military and public works contracts with the Philippine government, which is the subject of both the grand jury investigation in the Eastern District of Virginia and of the criminal complaint brought against Petitioners in the Philippines. Under the Mutual Assistance Agreement, the United States will be obligated to provide the Philippine

[1] A number of other individuals charged in the Philippine criminal action, including Irene Marcos Araneta and Gregorio Araneta III (President Marcos' daughter and son-in-law), Ambassador Benjamin Romualdez (Mrs. Marcos' brother), General Fabian Ver, and Eduardo Cojuangco, have been subpoenaed to appear before the Alevandria grand jury.

government with documents produced by Petitioners in response to the grand jury subpoenas. *See* 16a, *infra.*

On January 21, 1987, Petitioners moved to quash the grand jury subpoenas in the District Court for the Eastern District of Virginia. Petitioners raised three arguments: (1) that they were shielded from compelled production of documents to the grand jury under the customary international law doctrine of head of state immunity; (2) that they were entitled to assert their privilege against self-incrimination under the Philippine Constitution; and (3) that the United States was engaged in a "joint venture" with the Philippine government in the prosecution of Petitioners, which justified their assertion of the Fifth Amendment privilege. Additionally, Petitioners raised the argument submitted for this Court's review by President Marcos' daughter, Irene Marcos Araneta, and son-in-law, Gregoria Araneta III, in the Araneta's recent petition for a writ of certiorari, *viz.* that, setting the joint venture issue aside, Petitioners are entitled to assert their Fifth Amendment privilege against self-incrimination because of a real and substantial fear of prosecution in the Philippines. *Araneta v. United States,* No. 86-172, Petition for Writ of Certiorari (August 4, 1986), *cert. denied,* 107 S. Ct. 331 (Oct. 20, 1986).

Less than two weeks after Petitioners filed their motion to quash, on February 3, 1987, the Philippine government, in cooperation with the State Department, issued a diplomatic note purporting to waive the immunity enjoyed by Petitioners under international law. A copy of this note is reprinted in the Appendix at 13a.

At a closed hearing on February 11, 1987, the District Court for the Eastern District of Virginia (Hilton, J.) denied Petitioners' motion to quash. The Government then moved to confer "act of production" immunity on Petitioners under 18 U.S.C. §§ 6002-03. (The Government did not seek testimonial immunity at that time, and thus the

issue of whether petitioners' *testimony* can be compelled is not before the Court on this appeal.) *See* 9a, *infra.* The district court granted the Government's motion to confer "act of production" immunity, at which time Petitioners, who were not present at the hearing, represented through counsel that they would refuse to produce the documents despite the grant of immunity. The district court held Petitioners in contempt, ordered that they be confined, and stayed the confinement order pending appeal.

The Court of Appeals affirmed. On the issue of head of state immunity, the court held that "respect for Philippine sovereignty" required the court to honor the Philippine government's revocation of Petitioners' head of state immunity. The court also rejected Petitioners' arguments that they were entitled to assert the privilege against self-incrimination under both the Philippine and U.S. Constitutions.

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted To Review The Court Of Appeals' Ruling That The Immunity Accorded By U.S. Courts To A Former Head Of State Under International Law Can Be Waived By A Successor Government

In the proceedings below, Petitioners asserted that under the customary international law doctrine of head of state immunity, they are shielded from the compelled production of documents relating to activities and events that occurred while President Marcos was head of state of the Philippines. The Fourth Circuit did not challenge the principle that a former head of state living in the United States is entitled to claim head of state immunity. It held, however, that the Philippine government had effectively waived Petitioners' head of state immunity in the February 3, 1987 diplomatic note.

Despite the increasing number of cases in which head of state immunity has arisen,[2] considerable uncertainty surrounds the scope of the doctrine. *See generally* Note, *Resolving the Confusion Over Head of State Immunity: The Defined Rights of Kings*, 86 Colum. L. Rev. 169 (1986). The decision below decides one critical aspect of the doctrine: whether a foreign country can waive the immunity of its former head of state. Because no other U.S. court has addressed this question,[3] the Fourth Circuit's decision is likely to be viewed by both domestic and foreign courts—and foreign governments—as the authoritative American view on this subject. For this reason, prompt review of its conclusion is required.

The Fourth Circuit's conclusion that the current Philippine regime can waive Petitioners' immunity is fundamentally incompatible with the policies that underlie head of state immunity (and, indeed, sovereign immunity generally). Moreover, application of the Fourth Circuit's conclusion would lead to practical results which could severely undermine U.S. international relations and lead to attempted interference by other nations with the im-

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[2] In the past twenty-five years, seven head of state immunity cases have been before the U.S. courts. *See Republic of the Philippines v. Marcos*, Misc. No. 86-706 (WHO) (N.D. Cal.), Civ. Nos. 86-0213, 86-0155 (D. Hawaii); *Domingo v. Marcos*, Civ. No. C82-1055V (July 14, 1983); *O'Hair v. Wojtyla*, No. 79-2463, (D.D.C. Oct. 3, 1979) (excerpted in 1979 Dig. U.S. Prac. Int'l L. 897); *Kilroy v. Windsor (Prince Charles, The Prince of Wales)*, No. C-78-291 (N.D. Ohio Dec. 7, 1978) (excerpted in 1978 Dig. U.S. Prac. Int'l L. 641-43); *Psinakis v. Marcos*, No. C-75-1725 (N.D. Cal. 1975) (excerpted in 1975 Dig. U.S. Prac. Int'l L. 344-45); *Kendall v. Saudi Arabia*, (S.D.N.Y. 1965) (excerpted in 1977 Dig. U.S. Prac. Int'l L. 1053-54); *Chong Boon Kim v. Kim Yong Shik*, (Haw. Cir. Ct. Sept. 9, 1963) (excerpted in 58 Am. J. Int'l L. (1964)).

[3] The Fourth Circuit noted that the effect of the Philippine government's waiver appeared to be a question of first impression. *See* 4a, *infra*.

munities accorded under U.S. law to our own former heads of state. This analysis has four aspects.

First, as a practical matter, implementation of the Fourth Circuit's conclusion in this and similar cases could severely embarrass the United States in its international relations, since the court's mechanical adherence to a waiver theory provides no flexibility to deal with unexpected shifts in foreign political alignments. The significance of this problem was recently recognized by the U.S. Court of Appeals for the Ninth Circuit in *Republic of the Philippines v. Marcos*, Nos. 86-6091, 86-6093 (9th Cir. June 4, 1987). In that case, the court denied the Philippine government's request for a preliminary injunction to prevent the transfer of property held by or on behalf of the Marcoses. In holding that adjudication of the Marcoses' rights was likely to be barred by the act of state doctrine and/or the political question doctrine, the court observed:

> [J]ust as the position of our own executive branch is not dispositive on the issue, *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972) . . . so can we not give dispositive effect to the pronouncement of a foreign sovereign, particularly one with a stake in the current litigation. . . . While the acquiescence—indeed anxious invitation—of the current Philippine government allays one concern, it heightens others, making us leery of judicial involvement in this dispute.
>
> We cannot shut our eyes to the political realities that give rise to this litigation, nor to the potential effects of its conduct and resolution. Mr. Marcos and President Aquino represent only two of the competing political factions engaged in a struggle for control of the Philippines. While the struggle seems to be resolving itself in favor of President Aquino, this may not be the end of the matter. Only four years ago, the tables were turned, with Mr. Marcos in power and Mrs. Aquino and her husband in exile in the United States. While we are in no position to judge these

> things, we cannot rule out the possibility that the pendulum will swing again, or that some third force will prevail.

Slip op. at 30-31 (footnotes omitted) (emphasis added).

As a practical matter, the question of immunity for the former head of a foreign state will arise only where there is substantial friction with the incumbent government, and hence a likelihood of waiver. No former head of a foreign state is likely to take up residence in the United States without a conflict of that kind. Judicial sensitivity to the concerns raised in this case is therefore warranted not only in light of the current political realities in the Philippines, but also because of the recurring nature of the problem presented. The United States has frequently been a refuge for former heads of foreign states. It has assumed this role of sanctuary willingly, as a concomitant of its own history. Moreover, the twentieth century has seen a number of heads of state lose power to hostile regimes, only to regain their positions at a later date. In this perspective, it is dangerously short-sighted for the court below to create an exception to the head of state immunity heretofore assumed to be absolute.

Moreover, despite its U.S. grand jury origins, this case essentially involves a dispute between the Philippines and its former President.[4] To accord validity to the Philippines' purported waiver will clearly result in ultimate resolution of foreign domestic disputes by U.S. courts.[5]

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[4] That the U.S. grand jury action is directly related to the Philippines' own efforts to prosecute President Marcos is highlighted by the Mutual Assistance Agreement. *See* 15a, *infra*.

[5] At this stage, the dispute before the Court concerns the assertion of head of state immunity and its purported waiver. If the waiver is upheld, the U.S. courts can expect to be embroiled in additional intra-Philippine disputes between the current Philippine regime and President Marcos.

This is a role that the U.S. judiciary has consistently avoided.[6]

That the U.S. courts should not accord validity to the Philippines' purported waiver—and indeed should not become embroiled in a foreign internal dispute which they lack the legal competence to resolve—is confirmed by the issue of immunity created by the Philippine Constitution. According to the Ninth Circuit, the Philippine Constitution provides:

> The President shall be immune from suit during his tenure. Thereafter, no suit whatsoever shall lie for official acts done by him or by others pursuant to his specific orders during his tenure.[7]

The existence of this constitutional provision strongly suggests that the Philippine government's waiver of President Marcos's immunity is unconstitutional under Philippine law. If so, the waiver should not be accepted by this

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[6] The role of foreign arbiter has also been avoided by the courts of other nations when faced with similar foreign domestic disputes. Only a few weeks ago, a French court declined to decide a claim brought by Haiti against its former head of state and former minister of finance to recover funds allegedly diverted by those individuals during their tenure in office. *L'Etat Haitien v. Duvalier*, Nos. 3636/86, 1761/87, Judgment of June 23, 1987, Tribunal de Grande Instance, Grasse. While this decision was technically based on the lack of jurisdiction of French judicial courts over administrative matters, it effectively relegated Haiti to its own courts for purposes of claims against its former head of state. The court reasoned that even if foreign law permitted the adjudication of such a dispute by judicial courts, fundamental principles of French law (French *"ordre public"*) required that a French court could not adjudicate a dispute that it could not decide if it were a dispute between a French authority and its agent.

[7] This provision appeared in Article VII, Section 17 of the Philippine Constitution at the time that President Marcos was president, and, according to the Ninth Circuit, it "apparently, has been carried forward into the current constitution." *Republic of the Philippines v. Marcos*, Nos. 86-6091, 86-6093, slip op. at 36 (9th Cir. June 4, 1987).

Court as a valid legal act. The existence of the provision also reinforces the proposition that U.S. courts are not competent to decide foreign domestic legal disputes where the domestic law of the foreign state is controlling.

A second aspect of the immunity issue involves considerations of reciprocity. In a recent report by the Australian Law Reform Commission, which studied worldwide state immunity laws as part of the process of developing an Australian state immunity law, the Commission emphasized the importance of reciprocity in shaping state immunity determinations:

> To the extent that Australia is entitled to expect that other states will respect its authority over Australian matters, so it is reasonable that Australian law should acknowledge and respect the equivalent authority of other states. Conversely, if Australian law allows, for example, *the service of process on visiting heads of state* . . ., Australia cannot complain when other countries assert equivalent rights.

Australian Law Reform Commission, *Report No. 24, Foreign State Immunity* 23 (1984) (emphasis added).

This consideration has direct application to the present controversy. Petitioners submit that the United States would be outraged if a former U.S. president was served with process while visiting the Philippines—or Iran or the Soviet Union—and the local courts upheld the assertion of jurisdiction. Yet this result can be anticipated if the Fourth Circuit's decision is permitted to stand.

Third, U.S. law relating to the immunity of U.S. heads of state is relevant to the present case by analogy.[8] Under U.S. law, presidential privileges and immunities extend beyond the end of a president's term. *See Nixon v. Fitzgerald*, 457 U.S. 731 (1982). In *Nixon v. Administrator*

[8] Moreover, one of the sources of international law is "the general principles of law recognized by civilized nations." Statute of the International Court of Justice, June 26, 1945, art. 38(1)(c).

of General Services, 433 U.S. 425 (1977), this Court considered a challenge by former President Nixon to an Act providing, *inter alia*, for archival scrutiny of presidential papers [9]—documents arguably not different from those sought from President Marcos in this proceeding—on the ground that presidential privilege shielded the records from such scrutiny. The Court specifically considered whether lack of support from an incumbent president would deprive a former president of the right to assert the privilege. "Acceptance of that proposition" the court noted, "would, of course, end this inquiry." 433 U.S. at 448. However, the Court did not view the positions of successor Presidents Carter and Ford as dispositive and instead held that "the privilege survives the individual President's tenure." *Nixon v. Administrator of General Services*, 433 U.S. 425, 449 (1977) (quoting the Solicitor General). While the views of the incumbent President were considered relevant to the *weight* assigned to this qualified privilege, the Court upheld the statute only because "Appellant's [Nixon's] right to assert the privilege is specifically preserved by the Act." *Id.* at 455. In other words, the Court upheld the constitutionality of the Act because the Act recognized and safeguarded the former President's constitutional privilege.

In a recent opinion, the Justice Department has implemented the implication of the *AGS* case that the privilege cannot be waived by a successor:

> We start from the proposition, recognized in *Nixon v. Administrator* (433 U.S. at 448-449), that a former President may independently assert executive privilege....
>
> The Court's conclusion and reasoning in *Nixon v. Administrator* strongly indicate, in our view, that an incumbent President should respect a former Presi-

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[9] Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, §§ 101-106, 88 Stat. 1695-98 (1974) (codified as 44 U.S.C.A. § 2111 note (West Supp. 1987)).

> dent's claim of executive privilege if the incumbent either (a) would not have personally invoked the privilege under the circumstances or (b) does not believe that the documents fall within the scope of the privilege. A former President's privilege would be of little value if it were dependent upon the ratification of his successors. Moreover, we believe that it would be inconsistent with the rationale underlying the former President's privilege for the incumbent to sit as judge of the validity of a predecessor's claim. . . . Nonetheless, a former President has independent authority to claim executive privilege precisely because an incumbent may not be willing to safeguard the confidential communications of prior (and perhaps politically antagonistic) administrations.

U.S. Department of Justice, Office of Legal Counsel, Re: Nixon Paper Regulations (Memorandum of February 18, 1986) at 25.[10]

The argument for disregarding the Philippines' purported waiver is even more compelling than the arguments presented above by the Justice Department. In the domestic setting the Court in *AGS* and the Justice Department were interpreting the scope of a qualified privilege, while in the present case this Court is concerned with an absolute immunity for foreign heads of state, which is necessitated by considerations of sovereignty. *See, e.g., Hatch v. Baez*, 7 Hun. 596 (N.Y. Sup. Ct. 1876); 1 L. Oppenheim, *International Law* 758-762, 763 (8th ed. 1955). As such, while a U.S. president may not claim immunity from a criminal subpoena, *United States v. Nixon*, 418 U.S. 683 (1974), a foreign sovereign must be guaranteed just such immunity in consideration of international principles of sovereignty. As observed by

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[10] In *Public Citizen v. Burke*, 655 F. Supp. 318 (D.D.C. 1987), the United District Court for the District of Columbia upheld a challenge to this opinion. However, the court did not disagree that a former president could assert the privilege despite an incumbent's waiver. The government has appealed the district's court's decision.

Oppenheim, a foreign sovereign "must be exempt from every kind of criminal jurisdiction." 1 L. Oppenheim, *International Law* 759 (8th ed. 1955) (emphasis added). *See also The Christina* [1938] A.C. 485 at 508-09 ("the independent status in international law of the foreign sovereign . . . gives the sovereign, so far as concerns Courts of law, an immunity even in respect of conduct in breach of the municipal law").

Finally, the Fourth Circuit's conclusion that the current Philippine government can waive Petitioners' immunity is in conflict with one of the basic policies that underlies the head of state immunity doctrine. Head of state immunity is intended, in part, to promote the proper functioning of governments; and this purpose, articulated in this Court's decisions in the context of immunity for domestic officials, applies equally in the international sphere:

> In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of government, if he were subjected to any such restraint.

Spaulding v. Vilas, 161 U.S. 483, 498 (1896), *quoted in Nixon v. Fitzgerald*, 457 U.S. 731, 745 (1982). Judicial acceptance of the power of successor governments to waive the immunity of their former leaders sharply undercuts the policy of protecting the ability of national leaders to conduct the affairs of state unencumbered by the fear of being subjected to judicial process.

For these reasons, Petitioners submit that the Fourth Circuit's ruling that political adversaries have the power to expunge at will international legal protections from their political opponents once they have been retired from

office should not be allowed to stand. The Fourth Circuit's decision is not only in conflict with both international and domestic law, but also severely constricts the flexibility of the United States to provide sanctuary to foreign heads of state. Because of the importance of this question for U.S. international relations, review by this Court is appropriate.

II. Certiorari Should Be Granted To Review The Court Of Appeals' Holding That The Executive Has The Power To By-Pass An Act Of Congress Through The Use Of A Sole Executive Agreement

As discussed *supra*, the United States and the Philippine governments have entered into a Mutual Assistance Agreement providing for cooperation with respect to criminal investigations ongoing in both countries.[11] *See* 15a, *infra*. The agreement obligates the United States to provide the Philippine government with evidence relating to corruption in connection with arms sales to the Philippines, which is the subject matter of the Alexandria grand jury investigation. As a result, it is undisputed that the U.S. will be obligated by the agreement to provide the Philippine government with copies of any documents produced by Petitioners to the grand jury.

By its own terms, the operation of the Mutual Assistance Agreement is subject to the "law, practice and procedure" of the United States. *See* 16a, *infra*. The basic defining legislation for the agreement is 28 U.S.C. § 1782, which governs judicial assistance to foreign tribunals. *See* 14a, *infra*.[12]

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[11] We have been advised by the Treaty Desk at the State Department that the agreement is a so-called "sole" Executive agreement concluded pursuant to the inherent powers of the President under the Constitution and to 22 U.S.C. § 2656, which governs the authority of the Secretary of State to manage foreign affairs.

[12] This is reflected in a declaration made by the Assistant United States Attorney in charge of the Alexandria grand jury investigation regarding the Mutual Assistance Agreement:

> "The June 11, 1986 *Agreement on Procedures for Mutual Legal Assistance* makes it clear that information and evidence

Among its provisions, § 1782 states that witnesses who provide evidence in a U.S. proceeding at the request of a foreign litigant or tribunal are entitled to assert the privileges available under the laws of the requesting state. Thus, because of the nexus with the Philippine investigation established here by the Mutual Assistance Agreement, Petitioners should be entitled to assert the privilege against self-incrimination under the Philippine Constitution.[13]

The Circuit Court rejected this argument, holding, despite the obligation of the U.S. Government to provide the Philippines any documents produced to the grand jury by Petitioners, and despite the Philippine government's active involvement in the procurement of Petitioners' documents through its production of a "waiver" of Petitioners' immunity, that there is "no evidence" that the Philippine government "requested" the grand jury to subpoena Petitioners' documents.

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gathered by the United States will be disclosed to the Philippine government only in accordance with 'the law, practice and procedure' of the United States. *See* Agreement ¶ 13. *See also* 28 U.S.C. §§ 1781 and 1782 (which require courts of the United States to assist foreign and international tribunals and litigants in gathering evidence in the United States pursuant to letters rogatory)."

Declaration of Theodore S. Greenberg, Esq., filed in *United States v. Under Seal (Romualdez)*, reprinted in the Appendix at 19a.

[13] Buttressing this conclusion, the model mutual assistance treaty developed jointly by the State Department, the Department of Justice and the Treasury Department in 1978 expressly provides that:

> "[a] person whose testimony is requested under this treaty shall be compelled to appear, testify and produce documents, records and articles to the same extent as in investigations or proceedings in the requested State. *Such person may not be so compelled if under the law in either State he has a personal privilege to refuse. . . .*"

See 1978 Dig. U.S. Prac. Int'l L. 857, 861 (emphasis supplied).

The Fourth Circuit's decision is both wrong and dangerous, for it authorizes the Executive to by-pass Congressional legislation—in this case, § 1782—through the use of a sole Executive agreement. This holding conflicts with the extant authority in this area, including decisions of this Court, which establish that the Executive cannot, through the use of a sole Executive Agreement, by-pass the provisions of federal legislation. *See, e.g., United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955); *Swearingen v. United States*, 556 F. Supp. 1019 (D. Colo. 1983); *see also Department of State, Foreign Affairs Manual*, Vol. 11, Ch. 700 § 721.2(3) ("[t]he President may conclude an international agreement on any subject within his constitutional authority so long as the agreement is not inconsistent with legislation enacted by Congress in the exercise of its constitutional authority"); *see generally* RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 135, Reporters' Note 5 (Tent. Draft No. 6, 1985) *Cf. Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636-38 (1952) (Jackson, J., concurring) ("when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . .").

The use of mutual assistance agreements has expanded exponentially since they were first introduced in the mid-1970's in connection with the scandal involving bribes and kickbacks allegedly paid to Japanese businessmen and officials by representatives of the Lockheed Aircraft Corporation and other U.S. aerospace companies. *See generally* Ristau, *International Cooperation in Penal Matters: The "Lockheed Agreements," reprinted in Transnational Aspects of Criminal Procedure* (Clark Boardman 1983).[14]

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[14] Ristau lists over two dozen mutual assistance agreements that have been concluded over the past decade. *See id.* at 100 n.23.

Because of the growing reliance on mutual assistance agreements, the decision below will have an adverse impact on the rights of a wide and expanding class of persons, not just former heads of state. For this reason, prompt review and reversal by this Court is required.

III. Certiorari Should Be Granted To Review The Court Of Appeals' Ruling That The Fifth Amendment Does Not Protect A Witness From Producing Documents To A Federal Grand Jury Based On Fear Of Foreign Prosecution

In its decision below, the Fourth Circuit refused to reconsider its decision in *United States v. Under Seal* (*Araneta*), 794 F.2d at 920, in which it held that, despite a real and substantial danger of foreign prosecution, the Fifth Amendment did not entitle President Marcos' daughter and son-in-law to persist in refusing to testify before the grand jury in the Eastern District of Virginia once they had been granted use and derivative use immunity by the court. A copy of the *Araneta* decision is reprinted in the Appendix at 28a. The decision below requires review and reversal by this Court.

Though the question of whether the privilege against self-incrimination is available based on a fear of foreign prosecution is frequently recurring, the issue still has not been decided by this Court. The Court voted to consider this question in *Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472, 478 (1972), but did not reach the issue because the Court concluded that the witness "was never in real danger of being compelled to disclose information that might incriminate him under foreign law," *id.* at 480. This issue was presented again to the Court in *Araneta*. Chief Justice Burger, as Circuit Justice, granted a stay pending application for certiorari of the order holding the Aranetas in contempt, finding that:

> [I]t is more likely than not that at least five Justices will agree with the Court of Appeals that the ap-

> plicants face the kind of risk found lacking in *Zicarelli*, and will therefore reach and decide the question reserved in that case. And although such matters cannot be predicted with certainty, I conclude there is a "fair prospect" that a majority of this Court will decide the issue in favor of the applicants. *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964), contains dictum which, carried to its logical conclusion, would support such an outcome.

See 24a, *infra.* Following Chief Justice Burger's resignation from the Court, the Court ultimately denied the Aranetas' petition for a writ of certiorari, with three Justices (Brennan, White, Marshall) voting to grant certiorari.[15]

The constitutional question reserved in *Zicarelli* and raised again in *Araneta* is presented in much sharper relief in this case. Any doubt concerning the Fourth Circuit's determination that the Aranetas were confronted with a real and substantial risk of criminal prosecution in the Philippines is absent here. It is undisputed that President Marcos and his wife, not his children, are the principal targets of the Philippine prosecution. Closely related to this is the fact that the Fourth Circuit's conclusion in *Araneta* that Rule 6(e) is inadequate to ensure that the Aranetas' testimony would not be disclosed to the Philippine government is even more powerfully supported here, where President Marcos himself has been ordered to produce documents to the grand jury. This case, as the Circuit Court noted, "has excited an unusual degree of public interest." *See* 36a, *infra.* The pressures for "inadvertent disclosure," recognized in *Araneta*, are present in the extreme in the instant case.[16]

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[15] A stay pending application for certiorari to hear this same issue was granted by Justice Stevens in *Mikutaitis v. United States*, 107 S. Ct. 3 (Sept. 17, 1986).

[16] Indeed, undersigned counsel were surprised to find reporters present in court at argument before the Fourth Circuit in this case, which, prior to that moment, had remained under seal.

Accordingly, the issue of whether the Fifth Amendment is available based on fear of foreign prosecution is presented unencumbered in this case, and should be decided by this Court. Substantial confusion exists on this issue. *Compare Yves Farms, Inc. v. Rickett*, No. 86-174-3-MAC, slip op. (M.D. Ga. May 13, 1987) (recognizing applicability of the privilege where there is a real and substantial risk of foreign prosecution); *Mishima v. United States*, 507 F. Supp. 131, 135 (D. Alaska 1981) (same); *United States v. Trucis*, 89 F.R.D. 671, 673 (E.D. Pa. 1981) (same); *In re Cardassi*, 351 F. Supp. 1080, 1085-86 (D. Conn. 1972) (same); *with United States v. Under Seal (Araneta)*, 794 F.2d at 920; *Parker v. United States*, 411 F.2d 1067, 1070 (10th Cir. 1969), vacated and dismissed as moot, 397 U.S. 96 (1970); and *Phoenix Assurance Co. v. Runck*, 317 N.W.2d 402 (N.D.), *cert. denied*, 459 U.S. 862 (1982).

The issue also has attracted considerable academic attention. *Compare* Note, *Testimony Incriminating Under the Laws of a Foreign Country—Is There a Right to Remain Silent?* 11 N.Y.U. J. Int'l L. & Pol. 359 (1978); Comment, *Fear of Foreign Prosecution and the Fifth Amendment*, 58 Iowa L. Rev. 1304 (1973); Comment, *Criminal Law—Self-Incrimination—the Fifth Amendment Protects a Witness Who Refuses to Testify for Fear of Self-Incrimination Under the Laws of a Foreign Jurisdiction*, 5 Rut.-Cam.L. Rev. 146 (1973) *with* Note, *The Reach of the Fifth Amendment Privilege When Domestically Compelled Testimony May Be Used In A Foreign Country's Court*, 69 Va. L. Rev. 875 (1983).[17]

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[17] This issue has arisen repeatedly, although most courts have not reached the constitutional question because of their threshold finding that the witness had not demonstrated a substantial risk that compelled testimony would be used against him in a foreign prosecution. *See, e.g., In re President's Commission on Organized Crime*, 763 F.2d 1191 (11th Cir. 1982); *In re Grand Jury*, 705 F.2d 1224 (6th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983) (collecting cases); *In re Flanagan*, 6912 F.2d 116 (2d Cir. 1982); *In re*

Because this issue is recurring and represents an important aspect of Fifth Amendment law, review by this Court is appropriate.

Moreover, even a brief look at the Fourth Circuit's decision in *Araneta* shows that the decision is wrong, as it rests on an incorrect analysis of this Court's precedent. The linchpin of the *Araneta* holding is the statement that "the Fifth Amendment privilege applies only where the sovereign compelling the testimony and the sovereign using the testimony are both restrained by the Fifth Amendment from compelling self-incrimination." *See* 38a, *infra.* From this premise, the Fourth Circuit concludes that the Fifth Amendment is not available to the Aranetas (and thus is not available to the Marcos' in this case) because the Fifth Amendment does not bind the Philippines and therefore does not prohibit the use of compelled incriminating testimony in a Philippine court. *See* 38-39a, *infra.*

The *Araneta* holding rests on this Court's analysis in *United States v. Murdock*, 284 U.S. 141 (1931), in which the Court held, at a time when the Fifth Amendment applied only to the federal government, that the Fifth Amendment did not forbid the United States from compelling testimony from a witness that would incriminate him under state law. The reasoning of *Murdock*, however, was overruled explicitly by this Court in *Murphy v.*

Baird, 668 F.2d 432 (8th Cir.), *cert. denied*, 456 U.S. 982 (1982); *In re Federal Grand Jury Witness*, 597 F.2d 940 (2d Cir. 1972); *In re Quinn*, 525 F.2d 222 (1st Cir. 1975); *In re Tierney*, 465 F.2d 806 (5th Cir. 1972), *cert. denied*, 410 U.S. 914 (1973). The issue has also arisen but become moot when witnesses have opted to testify rather than suffer contempt sanctions as the cost of litigating the scope of the privilege. *See, e.g., Parker v. United States*, 411 F.2d 1067 (10th Cir. 1969), *opinion vacated and dismissed as moot*, 397 U.S. 96 (1970) where a witness chose to purge herself of contempt by testifying during the course of appellate proceedings.

Waterfront Commission, 378 U.S. 52 (1964), which held that "the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law." *Id.* at 77-78. In *Murphy*, the Court said:

> [N]either the reasoning nor the authority relied on by the Court in *United States v. Murdock*, 284 U.S. 141, supports its conclusion that the Fifth Amendment permits the Federal Government to compel answers to questions which might incriminate under state law.

Id. at 73. The Court later reiterated its rejection of *Murdock*:

> In light of the history, policies and purposes of the privilege against self-incrimination, we now accept as correct the construction given the privilege by the English courts and by Chief Justice Marshall and Justice Holmes. *See United States v. Saline Bank of Virginia, supra; Ballman v. Fagin, supra. We reject —as unsupported by history or policy—the deviation from that construction only recently adopted by this Court in United States v. Murdock, supra, and Feldman v. United States, supra.*

Id at 77 (emphasis supplied). In light of these clear statements by this Court, the Fourth Circuit's reliance on *Murdock* is completely erroneous, and requires correction by this Court.

Indeed, the *Murphy* analysis of the policies and purposes of the privilege against self-incrimination compel the conclusion here that the privilege should be available if the compelled testimony would incriminate the witness in a foreign country. The *Murphy* Court articulated the policies of the privilege as follows:

> [o]ur unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather

> than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," [citation]; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," [citation]; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

Id. at 55.

The heart of the *Murphy* decision is the Court's observation that "[m]ost, if not all, of these policies and purposes are defeated when a witness 'can be whipsawed into incriminating himself under both state and federal law'. . . ." 378 U.S. at 55, *citing Knapp v. Schweitzer*, 357 U.S. 371, 385 (Black, J., dissenting). The Court observed that this "has become especially true in our age of 'cooperative federalism,' where the Federal and State Governments are waging a united front against many types of criminal activity." *Id.* at 55-56. Today, 25 years after the *Murphy* decision, the same reasoning applies to an age where cooperation in criminal investigations has spilled over national borders. It is because both international cooperation and the "cooperative federalism" that spawned the *Murphy* decision bear an identical impact on the policies and purposes of the privilege that the *Murphy* holding requires application by this Court in the instant case. As former Chief Justice Burger observed in granting the stay in *Araneta*, the reasoning of *Murphy*, "carried to its logical conclusion," mandates the conclusion that the privilege should be available based on a fear of foreign prosecution.

IV. Certiorari Should Be Granted To Review The Fourth Circuit's Holding That The U.S. Will Be Engaged In A Joint Venture With The Philippine Government For Constitutional Purposes Only Where The U.S. Inspired, Instigated Or Controls The Philippine Prosecution

The *Araneta* decision specifically reserved the question of whether the Fifth Amendment would be available based on a fear of foreign prosecution where it can be shown that the United States government was "participating" in the foreign prosecution:

> Fully mindful of our obligation to decide only the case before us, we nevertheless feel compelled to note what is not at issue in this case. First, there has been no attempt to show that the United States *inspired, instigated or controls* the Philippine prosecution [citations]. In addition, petitioners have not suggested that the United States, in compelling their testimony under a grant of immunity, pursues no legitimate purpose of its own, even if it also has an intention to assist a foreign government whose continued good will is of great strategic importance. In short, petitioners have not presented to us a claim of American participation in a foreign prosecution, either actually, through a joint venture with foreign law enforcement officials, or constructively, by means of employing such individuals as agents. The case before us does not require us to address either of these factual patterns, and we express no views on them at this time.

794 F.2d at 928 (emphasis added). *See* 42a, *infra.*

Federal participation in the Philippine prosecution would "constitutionalize" the non-federal activity, thus eliminating the basis of the court's holding in *Araneta* that the privilege against self-incrimination is not available because the sovereign using the testimony is not constrained by the Fifth Amendment. Under the Fourth Circuit's analysis, therefore, if the U.S. Government is engaged in a "joint venture" with the Philippine Govern-

ment, Petitioners will be entitled to persist in asserting the Fifth Amendment before the grand jury despite the grant of immunity from the U.S. Government.

In the proceedings below, Petitioners urged the Fourth Circuit to reconsider its conclusion, expressed in the above-cited passage, that the United States would be engaged in a "joint venture" with the Philippine government for constitutional purposes only where it can be shown that the U.S. government "inspired, instigated or controls" the Philippine prosecution. The court, without comment, declined to reconsider its decision.

The constitutional standard articulated by the Circuit Court is in direct conflict with the standard articulated by this Court in the cases which established the joint venture doctrine, *Byars v. United States*, 273 U.S. 28 (1927) and *Lustig v. United States*, 338 U.S. 74 (1949). These cases establish that a joint venture exists for constitutional purposes where there is *any* official involvement by the federal government in the non-federal investigation. Under these cases, decided before the U.S. constitution was applied to the states, federal participation in a state search acted to constitutionalize the search, rendering evidence obtained by unconstitutional means inadmissible in federal court.

Justice Frankfurter, writing for the Court in *Lustig v. United States*, provided a succinct explanation of the standard for finding a joint venture:

> [T]he crux of [the *Byars*] . . . doctrine is that a search is a search by a federal official if he had a hand in it . . . . The decisive factor in determining the applicability of the *Byars* case is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means. It is immaterial whether a federal agent originated the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely ac-

> complished, he must be deemed to have participated in it.

338 U.S. at 78-9.

As discussed above, the past decade has seen a sharp increase in international cooperation in the area of law enforcement. In the coming years, U.S. officials will become increasingly involved in cooperative efforts with the law enforcement officials of foreign countries. In this context, the decision below, which is in direct conflict with the seminal decisions of this Court, will create substantial uncertainty regarding the level of U.S. participation in a foreign prosecution that establishes a "joint venture" for constitutional purposes. There is no reason for this Court to await further developments in this area before exercising its powers of review. Because the need for a clear standard in this area is acute, certiorari should be granted to allow the Court to address this issue.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order and judgment of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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Dated: July 6, 1987

APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT COURT

No. 87-5527

IN RE: GRAND JURY PROCEEDINGS: JOHN DOE #700

UNITED STATES OF AMERICA,
Plaintiff—Appellee,

versus

(UNDER SEAL),
Defendant—Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA.
CLAUDE M. HILTON, DISTRICT JUDGE. (GJ-86-2)

Argued: April 6, 1987 Decided: May 5, 1987

BEFORE WINTER, Chief Judge, and WIDENER and PHILLIPS, *Circuit Judges.*

Richard A. Hibey (Timothy M. Broas; Gordon A. Coffee; Thomas P. Steindler; Anderson, Hibey, Nauheim &

Blair on brief) for Appellants; Vincent L. Gambale, Special Assistant, United States Attorney (Henry E. Hudson, United States Attorney; Theodore S. Greenberg, Assistant United States Attorney on brief) for Appellee.

WINTER, Chief Judge:

Ferdinand and Imelda Marcos appeal from the district court's order holding them in contempt for refusing to produce documents before a federal grand jury. The Marcos' argue that they are shielded from compulsory process by head-of-state immunity and that they are protected from providing evidence by the privilege against self-incrimination under both the Philippine and United States Constitutions. We affirm the contempt order.

I.

Ferdinand Marcos is the former President of the Republic of the Philippines, and Imelda Marcos is his wife. In early 1986, Mr. Marcos' presidency came to an end, and he was replaced by Corazon Aquino. On February 26, 1986, Mr. and Mrs. Marcos left the Philippines and flew to the United States, where they have remained ever since.

In January 1987 a federal grand jury in the Eastern District of Virginia issued subpoenas commanding the Marcos' to testify before the grand jury in February 1987 and to provide certain documents relating to the Marcos government. These subpoenas superseded broader subpoenas issued by the same grand jury in December 1986. The grand jury, which was convened before the Marcos' arrival in the United States, is investigating possible corruption in American companies' arms contracts with the Philippines. The Marcos' moved to quash the subpoenas, invoking head-of-state immunity and the privileges against self-incrimination under both the United States and the Philippine Constitutions. Shortly thereafter, on February 3, 1987, the Aquino government issued a diplomatic note purporting to waive any residual

head-of-state or diplomatic immunity enjoyed by Mr. and Mrs. Marcos.

At a closed hearing on February 11, 1987, at which the Marcos' were not present, the district court denied the motion to quash on the grounds that the Philippine government had waived the Marcos' head-of-state immunity and on the grounds that fear of foreign prosecution did not justify invocation of the United States or Philippine privilege against self-incrimination. The government then moved to confer "act of production" immunity on Mr. and Mrs. Marcos *in absentia* under 18 U.S.C. §§ 6002-6003. At that time, the government did not seek testimonial immunity, the court granted the government's motion to confer "act of production" immunity, and counsel for the Marcos' then stated that his clients would refuse to produce the documents notwithstanding the grant of immunity.* The district court held the Marcos' in contempt, ordered that they be confined, and stayed the confinement order pending this appeal.

II.

We turn first to the contention that Mr. Marcos is entitled to immunity from process as a former head of state and that Mrs. Marcos is entitled to immunity as the wife of a former head of state. Head-of-state immunity is a doctrine of customary international law. Generally speaking, the doctrine maintains that a head of state is immune from the jurisdiction of a foreign state's courts, at least as to authorized official acts taken while the ruler is in power. *See e.g.*, *Kilroy* v. *Windsor* (*Prince Charles, The Prince of Wales*), Civ. No. C-78-291 (N.D. Ohio 1978), *excerpted in* 1978 Dig. U.S. Prac.

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* In fact, by agreement of the parties, the documents had been transmitted to the district court pending "the ultimate resolution of [the Marcos'] claims of privilege and immunities with respect to th[e] documents." The agreement was approved by the district court which then ordered the documents sealed and accessible to no one until the outcome of this litigation.

Int'l L. 641-43; *Chong Boon Kim* v. *Kim Yong Shik* (Hawaii Cir. Ct. 1963), *excerpted in* 58 Am. J. Int'l L. 186-87 (1964); *Hatch* v. *Baez*, 7 Hun. 596 (N.Y. Sup. Ct. 1876). Like the related doctrine of sovereign immunity, the rationale of head-of-state immunity is to promote comity among nations by ensuring that leaders can perform their duties without being subject to detention, arrest or embarrassment in a foreign country's legal system. *See generally* Note, *Resolving the Confusion Over Head of State Immunity: The Defined Rights of Kings*, 86 Colum. L. Rev. 169, 171-79 (1986).

The exact contours of head-of-state immunity, however, are still unsettled. The cases do not make clear, for example, whether a state can waive one of its former ruler's head-of-state immunity, as the current Philippine government has endeavored to do here. Indeed, not one of the cases cited by the Marcos' even addresses the issue. *See O'Hair* v. *Wojtyla*, Civ. No. 79-2463 (D.D.C. 1979), *excerpted in* 1979 Dig. U.S. Prac. Int'l L. 897 (holding that suit against the Pope was prohibited by the Foreign Sovereign Immunities Act, 28 U.S.C. § 1601 *et seq.*); *Kilroy* v. *Windsor*, *supra* (holding Prince Charles immune in accordance with a State Department Suggestion of Immunity); *Psinakis* v. *Marcos*, Civ. No. C-75-1725 (N.D. Cal. 1975), *excerpted in* 1975 Dig. U.S. Prac. Int'l L. 344-45 (honoring a Suggestion of Immunity for then-President Marcos); *Chong Boon Kim* v. *Kim Yong Shik*, *supra* (honoring a Suggestion of Immunity for a Korean foreign minister). The effect of the Philippine government's "waiver" therefore appears to be a question of first impression.

We think the waiver should be given full effect. Head-of-state immunity is founded on the need for comity among nations and respect for the sovereignty of other nations; it should apply only when it serves those goals. In this case, application of the doctrine of Ferdinand and Imelda Marcos would clearly offend the present Philip-

pine government, which has sought to waive the Marcos' immunity, and would therefore undermine the international comity that the immunity doctrine is designed to promote. Our view is that head-of-state immunity is primarily an attribute of state sovereignty, not an individual right. Respect for Philippine sovereignty requires us to honor the Philippine government's revocation of the head-of-state immunity of Mr. and Mrs. Marcos.

Related principles of diplomatic immunity support the conclusion that head-of-state immunity can be waived by the sovereign. The Vienna Convention on Diplomatic Relations, to which the United States is a party, provides that diplomats of the sending state generally are immune from criminal and civil process of the receiving state, that they are "not obliged to give evidence as a witness," and that their persons are "inviolable." Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95, Articles 31(1), 31(2), 29. But the Convention also provides that "[t]he immunity from jurisdiction of diplomatic agents [and their families] . . . may be waived *by the sending State*. *Id.* Art. 32(1) (emphasis added). That waiver must be "express." *Id.* Art. 32(2). Clearly, an individual enjoys diplomatic immunity only at the pleasure of that individual's state. It is true that this provision of the Vienna Convention applies only to diplomats, but we see no reason that its rationale should not also apply to heads of state. It would be anomalous indeed if a state had the power to revoke diplomatic immunity but not head-of-state immunity.

The Marcos' contend that honoring the Philippine government's waiver will establish a system that is not "civilized," since "political enemies [will be] entitled to expunge international legal protections from their adversaries once they have been removed from office—peacefully or otherwise." This prospect does not change our view of the case. As we see it, a fundamental charac-

teristic of state sovereignty is the right to determine which individuals may raise the flag of the ship of state and which may not. This system may indeed be somewhat "uncivilized," as the Marcos' suggest, because it may degrade ex-rulers who happen to fall out of favor with their former constituents or political successors. But the system suggested by Mr. and Mrs. Marcos would be at least as uncivilized, for it would allow disfavored ex-rulers to mock the existing government by claiming immunity in the name of that government.

Finally, the Marcos' argue that the "more appropriate approach" to this issue is that taken by the Supreme Court in *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), in which the Court held former President Nixon immune from civil liability for his official acts. The issue in this case, however, is not whether the Marcos' may be civilly liable, but whether they are wholly immune from process. Moreover, as the government points out, an ex-President may be subpoenaed "to produce relevant evidence in a criminal case," *id.* at 760 (Burger, C.J., concurring), and even a sitting President may not claim immunity from a criminal subpoena. *United States* v. *Nixon*, 418 U.S. 683 (1974). We hardly think the *Nixon* cases support the Marcos' claim that they are entirely immune from process.

In sum, we hold that the current Philippine government has waived whatever head-of-state immunity was enjoyed by Ferdinand and Imelda Marcos. We therefore need not decide whether that immunity would have extended to unauthorized acts carried out during Mr. Marcos' term or whether it would have been limited to official authorized acts. Nor is it necessary for us to decide whether to defer to the opinion of the Deputy Legal Advisor of the State Department, expressed in a letter that is part of the record, that the Marcos' are not entitled to head-of-state immunity.

We affirm the district court's holding that the Philippine government has waived the Marcos' head-of-state immunity.

III.

The next question presented is whether 28 U.S.C. § 1782(a) forbids the government to take the Marcos' grand jury testimony in violation of the Philippine privilege against self-incrimination. The question arises because the United States and the Philippines have entered into an executive agreement providing for mutual cooperation with respect to criminal investigations ongoing in both countries. By its terms, however, each government is constrained by the "law, practice and procedure" of the United States. The Marcos' contend that 28 U.S.C. § 1782(a) makes applicable to the United States the Philippine privilege against self-incrimination.

Section 1782 regulates the taking of testimony in United States courts pursuant to formal requests, known as letters rogatory, from foreign governments: It states:

> § 1782. Assistance to foreign and international tribunals and to litigants before such tribunals.
>
> a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person . . . .
>
> A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

The section forbids the taking of testimony in violation of any privilege, including the Philippine privilege against self-incrimination.

The Marcos' argue that § 1782 applies here because the grand jury subpoenas were "made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal . . . ." We disagree. The subpoenas were issued as part of a grand jury investigation that began before the Marcos' arrived in the United States. Although the Philippine and United States government have entered into a Mutual Assistance Agreement, ensuring mutual cooperation in criminal investigations, there is no evidence that a Philippine "tribunal" issued "letters rogatory" or "requested" that the grand jury issue subpoenas to Mr. and Mrs. Marcos. The evidence is instead that the federal grand jury issued the subpoenas on its own initiative as part of its ongoing investigation into corruption in the dealings of American corporations with the Marcos regime. We therefore reject the argument that § 1781 applies to these grand jury subpoenas. It follows that § 1782 does not render applicable the Philippine privilege against self-incrimination.

IV.

The Marcos' also argue that compelling them to produce evidence will violate their Fifth Amendment privilege against self-incrimination, because the United States government's grant of prosecutorial immunity cannot shield them from prosecution in the Philippines. They ask us to reconsider our decision in *United States* v. *Under Seal* (*Araneta*), 794 F.2d 920, 925-28 (4th Cir.), *cert. denied*, 55 U.S.L.W. 3278 (1986), in which we held that the Fifth Amendment privilege against self-incrimination provides no protection from self-incrimination under foreign law. We decline to overturn our holding in *Araneta*, and we therefore affirm the district court's decision that enforcement of the subpoenas will not violate the Marcos' Fifth Amendment rights.

V.

Finally, the government contends that this appeal controls the Marcos' obligation to testify as well as their obligation to produce documents. The government stresses that the Marcos' moved to quash the subpoena's command that they testify as well as its command that they produce documents, and that their motion was denied in its entirely. But after the motion was denied, the government sought and obtained only "act of production" immunity for the Marcos'. It did not seek testimonial immunity. At the contempt hearing the government moved to hold the Marcos' in contempt only for refusing to "provide the documents called for in the subpoena," and the district court's order held the Marcos' in contempt only "for refusing to provide the documents to the grand jury." Neither the motion nor the order mentioned the Marcos' refusal to testify.

Only the contempt order, not the motion to quash, is appealable, *see Cobbledick* v. *United States*, 309 U.S. 323 (1940), and accordingly only the issues raised in the contempt order are before us. Therefore the only issue we decide is the validity of the order finding the Marcos' in contempt for failing to produce the documents. We express no view with regard to any refusal on the part of the Marcos' to testify before the grand jury should they be given testimonial immunity.

VI.

To summarize, we hold that the Marcos' are not entitled to head-of-state immunity from process to produce documents and that they are not shielded from providing such documents by the privilege against self-incrimination of either the Philippine or United States Constitutions.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-5527

UNITED STATES OF AMERICA,
Appellee,

v.

(UNDER SEAL),
Appellant.

[Filed May 26, 1987]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA.
CLAUDE M. HILTON, DISTRICT JUDGE

Upon consideration of appellants' emergency motion for stay of mandate and the appellee's response thereto,

IT IS ORDERED that the motion for stay is granted pending the filing of a petition for certiorari.

Entered at the direction of Chief Judge Winter with the concurrence of Judge Widener and Judge Phillips.

For the Court,

/s/ JOHN M. GREACEN
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Grand Jury 86-2

IN RE: GRAND JURY SUBPOENAS
TO FERDINAND and IMELDA MARCOS
(JOHN DOE 700)

ORDER

This matter came before the Court this 11th day of February, 1987, on the government's motion for a grant of immunity and an order requiring the above named witnesses to produce documents before the grand jury, motions to quash subpoenas to the witnesses, and a motion to hold them in contempt for refusing to provide the documents to the grand jury on the basis of former head-of-state immunity and various alleged privileges against self-incrimination. Counsel agreed that all motions be heard in the same hearing.

After hearing argument and for the reasons stated from the bench, it is hereby ORDERED:

That the government's motion for a grant of immunity and requiring the production of documents before the grand jury is GRANTED.

That the witness's motion to quash subpoenas is DENIED.

That, pursuant to 28 U.S.C. § 1826(a), the witnesses are in contempt of this Court's Order and Ferdinand Marcos and Imelda Marcos are committed to the custody of the Attorney General or his duly authorized represen-

tative until such time as they purge themselves of contempt or for the life of this grand jury.

That the commitment of Ferdinand Marcos and Imelda Marcos is stayed for a period of thirty (30) days, to permit an appeal of the Court's decision on the condition that they do not leave or travel outside the United States. If the Court of Appeals does not rule within the thirty (30) days, this commitment will be stayed until the Court of Appeals rules on the appeal from this Order.

/s/ Claude M. Hilton
United States District Judge

Date: February 11, 1987

Pasuguan Ng Pilipinas Embassy of the Philippines

Washington, D.C.

No. 0510188

The Embassy of the Philippines presents its compliments to the Department of State and has the honor to refer to the Department's Note of January 16, 1987 on the intention of a United States grand jury to seek the testimony of former President Ferdinand Marcos and his wife Imelda Marcos in connection with the investigation being conducted in the Eastern District of Virginia.

Taking note of the agreement on procedures for mutual legal assistance entered into between the Government of the United States and the Government of the Philippines, and other efforts of the parties to cooperate with respect to the investigation being conducted in the Eastern District of Virginia, the Government of the Philippines hereby waives any residual sovereign, head of state, or diplomatic immunity that former Philippine President Ferdinand Marcos and his wife Imelda Marcos may enjoy under international and U.S. law, including, but not limited to, Article 39(2) of the Vienna Convention on Diplomatic Relations, by virtue of their former offices in the Government of the Philippines. This waiver extends only to the testimony of Ferdinand and Imelda Marcos requested by the Government of the United States in the above case, and not to the Government of the Republic of the Philippines itself or to any of its other current or former officials.

The Embassy of the Philippines avails itself of this opportunity to renew to the Department of State the assurance of its highest consideration.

[SEAL]

3 February 1987

§ 1782. Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

AGREEMENT ON PROCEDURES FOR MUTUAL LEGAL ASSISTANCE

The United States of America and the Republic of the Philippines, hereinafter referred to as "the parties," agree to provide mutual assistance through the procedures set forth below in the investigation of alleged illegal activities involving:

(1) Contracts and agreements previously contemplated or entered into by and between the Government of the Republic of the Philippines or its instrumentalities, officials, or citizens, and any of the following:

(A) Westinghouse Electric Corporation, Burns and Roe Corporation, their subsidiaries, affiliates, officers, employees or agents;

(B) Amworld, Inc., Telecom Satellites of America, Digital Contractors, Inc., their subsidiaries, affiliates, officers, employees, or agents;

(C) Raysond Moreno and any person having a relationship with Moreno and/or any entity or company in which he is directly or indirectly involved; and,

(2) Such other contracts, agreements, and transactions involving American or Philippine companies or citizens as may be implicated in the foregoing investigations or which the foregoing investigations may suggest are involved in separate illegal activities.

1. The parties agree to appoint competent authorities to carry out the procedures under this Agreement. The competent authority for the United States shall be the United States Department of Justice. The competent authority for the Republic of the Philippines shall be the Presidential Commission on Good Government.

2. All requests for assistance shall be communicated directly between the competent authorities or their designees.

3. Upon request, each competent authority shall use its best efforts, in accordance with the law, practice and procedure of the requested state, to make available to the competent authority of the other party relevant and material information, such as statements, depositions, documents, business records, correspondence or other material available to it concerning alleged violations of law as described above.

4. Upon request, each competent authority shall render, in accordance with the law, practice and procedures of the requested state, assistance to the competent authority of the requesting state, such as locating witnesses, interviewing of witnesses, taking testimony or statements or the production of documents or other materials. Representatives of the requesting competent authority may participate in the execution of the request if the competent authority of the requested state consents. Neither party shall be obligated as part of such assistance rendered pursuant to this Agreement to immunize any person from prosecution, or to utilize compulsory measures to secure such assistance.

5. Such information shall be used exclusively for purposes of investigation conducted by agencies of the parties with law enforcement responsibilities and in ensuring criminal, civil or administrative proceedings in which such agencies are participating.

6. Except as provided in paragraph "7," all information made available by the parties pursuant to these procedures, and all correspondence between the competent authorities of the parties relating to such information and to the implementation of these procedures, shall be kept confidential and shall not be disclosed to third parties or to government agencies having no law enforcement re-

sponsibilities. Disclosure to other agencies having law enforcement responsibilities shall be conditioned on the recipient agency's acceptance of the terms set forth in this Agreement. In the event of any breach of confidentiality the other party may discontinue cooperation under this Agreement.

7. Information made available pursuant to this Agreement may be used in any ensuing criminal, civil or administrative proceedings which take place in the requesting state and in which an agency having law enforcement responsibilities is a party. The competent authorities of the parties shall use their best efforts to furnish the information in such form as to render it admissible pursuant to the rules of evidence in the requesting state, including, but not limited to, certifications, authentications, and other such assistance as may be necessary to facilitate admissibility. With respect to the public disclosure of such information in criminal, civil and administrative proceedings, the parties shall give advance notice and afford an opportunity for consultation before the use of any information is made available pursuant to these procedures.

8. The parties shall use their best efforts to assist in the expeditious execution of letters rogatory issued by the judicial authorities in connection with any legal proceedings which take place in their respective states.

9. All assistance by a requested state will be performed subject to all limitations imposed by its domestic law. Execution of a request for assistance may be postponed, denied or made subject to conditions to be agreed upon, if the requested competent authority determines that execution would interfere with any ongoing investigation or legal proceeding in the requested state.

10. Nothing in this Agreement shall require a party to initiate or participate in pending or future litigation.

11. Nothing in this Agreement shall limit the rights of the parties to utilize for any purpose information obtained independently of these procedures.

12. Except as otherwise provided herein, the mutual assistance to be rendered by the parties pursuant to this Agreement is designed solely for the benefit of their respective agencies having law enforcement responsibilities, and is not intended to benefit third parties.

13. An extension of this Agreement to other investigations being conducted or contemplated by the parties may be accomplished by an exchange of letters between the parties.

14. This Agreement shall enter into force on the date of signature by both parties.

Done at Manila, this eleventh day of June, 1986

FOR THE REPUBLIC OF THE PHILIPPINES:

/s/ Jovito R. Salonga
FOR THE REPUBLIC OF THE
Government of the Republic
Chairman, Presidential
Commission on Good
of the Philippines

FOR THE UNITED STATES:

/s/ Victoria Toensing
Deputy Assistant Attorney
General, Criminal Division
United States Department
of Justice

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

IN RE: GRAND JURY 85-3,
IN RE: GRAND JURY 86-2
JOHN DOE 700

Filed *In Camera*, and
Under Seal

(BENJAMIN ROMUALDEZ)

DECLARATION

I, Theodore S. Greenberg, being employed as an Assistant United States Attorney for the Eastern District of Virginia since February 1977, and with the Department of Justice since October 1974, hereby state:

1. Your declarant is the Assistant United States Attorney in charge of the investigation in *John Doe No. 700* (Grand Juries 85-3 and 86-2) and has performed in such capacity since the commencement of this investigation in October 1984.

2. Since its inception in October 1974 [sic], *John Doe No. 700* has been an investigation inquiring into violations of federal criminal law relating to fraud against the United States Department of Defense, Defense Security Assstance Agency.

3. Benjamin Romualdez has been subpoenaed by the Grand Jury to testify and produce documents. Romualdez

is the former Philippine Ambassador to the United States.

4. This Declaration is filed in support of the Government's opposition to Benjamin Romualdez's motion to quash a grand jury subpoena directing his appearance before the grand jury on July 7, 1986 and his motion for a protective order. Both motions are based on his fear of prosecution by the Philippine government.

5. Romualdez's motions are predicated on the theory that the Eastern District of Virginia grand jury investigation is "proceeding in lockstep" (Romualdez Motion at 3) with the Philippine government's investigation and prosecution of Romualdez as evidenced by an amended complaint filed in Manila by the Philippine Presidential Commission on Good Government (PCGG) on April 28, 1986 against Romualdez and twenty-nine other individuals including President Ferdinand Marcos. Romualdez Motion Ex. 1. It appears that Romualdez contends that the Eastern District of Virginia Grand Jury is being used by the Philippine government as a surrogate investigator to obtain evidence the Philippine government needs to prosecute Romualdez and others. More particularly, Romauldez states in his motion (p. 14) that:

> . . . the United States is undisputably participating in a foreign prosecution, either actually or constructively. The very title of the Agreement [Agreement On Procedures For Mutual Legal Assistance] leaves no doubt that the investigation into [Romualdez's] activities from 1966 to 1986 represents a *joint venture* conducted by officials of both countries. The United States government is compelling testimony under a grant of immunity in an effort to extract incriminating evidence against petitioner which will be turned over to the Philippine government to aid in their prosecution of [Romualdez]. (emphasis added).

6. I am not a surrogate investigator for the Philippine government; and the Eastern District of Virginia Grand Jury is not being used to collect evidence for the Philippine government. The Eastern District of Virginia's investigation at issue was begun in October 1984 and is being conducted independent of any Philippine government investigation. At pertinent times prior to April 3, 1986 Romualdez was an official in the Philippine government. The investigation began long before President Marcos was deposed on February 26, 1986.

7. The complaint filed by the Philippine Commission on Good Government in Manila on April 28, 1986 against Benjamin Romualdez and others was filed by the Philippine government without consultation with or direction by me. My recollection is that I heard about the complaint for the first time when the filing of it was reported in the Manila newspapers. More importantly, at no time was I asked for, nor did I provide information to the Philippine government which was used as a basis for the complaint filed against Romualdez and the others.

8. I have not consulted with the PCGG on the scheduling of their proceedings (Romualdez Motion, Ex. 3) and I have taken no action based on the PCGG schedule.

9. I schedule grand jury appearances in the Eastern District of Virginia investigation based on the availability of the grand jury, my schedule and what investigative information is available to me. I did not schedule Romualdez's grand jury appearance based upon any thought or consideration of how that might aid or affect the PCGG investigation.

10. I was one of the draftsmen of the Agreement on Mutual Assistance entered into by and between the United States Department of Justice and the Philippine Commission on Good Government. Prior to finalizing the Agreement presented to the PCGG we consulted with others in the Department of Justice who are experts in

the area of mutual assistance agreements. I believe that Justice Department personnel have participated, in one form or another, in all of the mutual assistance agreements that have been entered into since the prototype, "Procedures for Mutual Assistance in Administration of Justice in Connection with Lockheed Aircraft Corporation Matter, Mar. 23, 1976, United States—Japan, 27 U.S.T. 946, T.I.A.S. No. 8233.[1]

11. By the terms of the Agreement on Mutual Assistance in this case, as in all the mutual assistance agreements entered into over the years with law enforcement agencies all over the world, the United States Department of Justice obligates itself to do only that which is permitted under United States law and practice.

12. The June 11, 1986 *Agreement on Procedures for Mutual Legal Assistance* makes it clear that information and evidence gathered by the United States will be disclosed to the Philippine government only in accordance with "the law, practice and procedure" of the United States. See Agreement ¶ 3. See also 28 U.S.C. 1781 and 1782 (which requires courts of the United States to assist foreign and international tribunals and litigants in gathering evidence in the United States pursuant to letters rogatory).

14. I have not violated and do not intend to violate Rule 6(e), Fed. R. Crim. Proc. or to fail to carry out my other duties as an Assistant United States Attorney.

15. I was one of three persons representing the United States Department of Justice when the Mutual Assistant Agreement was reviewed in Manila on June 10, 1986

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[1] Some, but not all of the agreements arising out of the Lockheed case are set forth in, *International Exchange of Information in Criminal Cases* p. 100 fn.23 (attached to our opposition papers). This article is found in *Transnational Aspects of Criminal Procedure* 1983 Michigan Yearbook of International Legal Studies (Clark Boardman). These and other mutual assistance agreements are published in *Treaties in Force.*

with officials of the Philippine Presidential Commission on Good Government. At no time during that meeting, or in meetings prior to or subsequent thereto, did any Philippine official request information from me relative to the activities of Benjamin Romualdez. Further, at no time have I asked the Philippine government or any entity thereof for information about or concerning Romualdez.

16. To ensure that the provisions of the Mutual Assistance Agreement are properly carried out, each party has designated special channels through which requests and information will pass. I am the Justice Department's sole contact point with regard to *John Doe 700* and it is through me that information relative to this investigation will be released and received. Of course, my superiors in the Department of Justice will be privy to and will participate in these matters.

17. Nothing in the record of this matter, or in the record relating to the Araneta contempt (*United States* v. *(Under Seal)*, No. 86-5572, Slip Op. (4th Cir. June 23, 1986), *reh. denied*, (July 3, 1986) remotely suggests that agents of the United States government have violated or intend to violate the laws of the United States, including Rule 6(e), Fed. R. Crim. Proc., or the practices and procedures of the Department of Justice governing the release of information gathered in the course of federal criminal investigations.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 6th day July, 1986.

/s/ Theodore S. Greenberg
Assistant United States Attorney

SUPREME COURT OF THE UNITED STATES

No. A-18

GREGORIO ARANETA, III and IRENE MARCOS ARANETA

v.

UNITED STATES

ON APPLICATION FOR STAY

[July 19, 1986]

CHIEF JUSTICE BURGER, Circuit Justice.

Applicants, a daughter and son-in-law of former President Ferdinand Marcos, ask that I stay a contempt order of the United States District Court for the Eastern District of Virginia requiring their incarceration if they fail to testify before a grand jury on July 22. They contend that requiring them to so testify would violate their Fifth Amendment privilege against self-incrimination because their testimony might be used against them in related criminal proceedings currently pending in the Philippines. They assert they will file a petition for certiorari on this issue.

Soon after their arrival in the United States, applicants were served with subpoenas requiring their testimony before a Grand Jury sitting in the Eastern District of Virginia to investigate alleged corruption relating to arms contracts made with the government of the Philippines. The District Court denied the applicants' motion to quash the subpoenas on Fifth Amendment grounds,

and granted instead the Government's motion to give the applicants use and derivative use immunity as to prosecutions in the United States. The court also entered a restrictive order designed to protect the secrecy of their testimony and held that no constitutional question was presented because the applicants had not demonstrated a real and substantial danger of prosecution abroad.

The Court of Appeals affirmed, but on different grounds. It acknowledged that applicants faced a substantial possibility of prosecution in the Philippines. It also found the District Court's restrictive order insufficient to protect against disclosures to the Philippine government because, *inter alia*, the order itself contemplates permitting disclosure of applicants' testimony at a future date, and because the order does not prohibit the United States from revealing evidence derived from that testimony. The court therefore reached the constitutional question, and held that the Fifth Amendment privilege is not violated simply because compelled testimony might be used in a foreign prosecution. The court denied rehearing on July 3.

The requirements for obtaining a stay pending certiorari are well established. Such a stay should be granted only when (1) there is a reasonable probability that four Justices will vote to grant certiorari; (2) there is a fair prospect that a majority of the Justices will find the decision below erroneous; and (3) a balancing of the equities weighs in the applicant's favor. *See, e.g., National Collegiate Athletic Association* v. *Board of Regents*, 463 U.S. 1311, 1313 (1983) (WHITE, J., in chambers); *Gregory-Portland Independent School District* v. *United States*, 448 U.S. 1342, 1342 (1980) (REHNQUIST, J., in chambers); *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (BRENNAN, J., in chambers). In assessing whether each of these factors has been met, a Circuit Justice acts as a "surrogate for the entire Court." *Holtzman* v. *Schlesinger*, 414 U.S. 1304, 1313 (1973) (MARSHALL, J., in chambers).

As to the first requirement, I conclude that four Justices will likely vote to grant certiorari on the issue that presumably will be presented in the applicant's petition, namely whether the privilege against self-incrimination protects a witness from being compelled to give testimony that may later be used against him in a foreign prosecution. Substantial confusion exists on this issue.* Moreover, this Court voted to consider the question in *Zicarelli* v. *New Jersey State Commission of Investigation*, 406 U.S. 472, 478 (1972), but did not reach it because, in the view of the majority, the appellant here "was never in real danger of being compelled to disclose information that might incriminate him under federal law," *id.* at 480. We did, however, reserve the issue, observing that if the appellant should later be questioned about "matters that might incriminate him under foreign law and pose a substantial risk of foreign prosecution, . . . , then a constitutional question will be squarely presented." *Id.*, at 481.

Against this background, it is more likely than not that at least five Justices will agree with the Court of Appeals that the applicants face the kind of risk found lacking in *Zicarelli*, and will therefore reach and decide the question reserved in that case. And although such matters cannot be predicted with certainty, I conclude there is a "fair prospect" that a majority of this Court will decide the issue in favor of the applicants. *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964), contains dictum which, carried to its logical conclusion, would support such an outcome. That case held only that the privilege against self-incrimination protects a witness against

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* Compare *Mishima* v. *United States*, 507 F. Supp. 131, 135 (Alaska 1981); *United States* v. *Trucis*, 89 F. R. D. 671, 673 (E.D. Pa. 1981); and *In re Cardassi*, 351 F. Supp. 1080, 1085-1086 (Conn. 1972); with *Parker* v. *United States*, 411 F.2d 1067, 1070 (CA 10 1969), vacated and dismissed as moot, 397 U.S. 96 (1970); and *Phoenix Assurance Co.* v. *Runck*, 317 N.W. 2d 402, 413 (N.D.), cert. denied, 459 U.S. 862 (1982).

compelled disclosures in state court which could be used against him in federal court or vice versa. However, the Court also discussed with apparent approval several English cases holding that the privilege protects a witness from disclosures which could be used against him in a foreign prosecution. *See id.*, at 58-63, 77; *United States of America* v. *McRae*, L. R., 3 Ch. App. 79 (1867); *Brownsword* v. *Edwards*, 2 Ves. sen. 243, 28 Eng. Rep. 157 (Ex. 1750); *East India Co. v. Campbell*, 1 Ves. sen. 246, 27 Eng. Rep. 1010 (Ex. 1749).

Finally, I conclude that the equities weigh in applicants' favor, particularly if the stay is appropriately conditioned. Applicants clearly will suffer irreparable injury if the Court of Appeals is right about the likelihood of prosecution and the inability of the District Court's restrictive order to prevent disclosure. Cf. *Garrison* v. *Hudson*, 468 U.S. 1301, 1302 (1984). If that secrecy order is enforceable under all circumstances, it may afford applicants protection should they later be extradited for trial in the Philippines; however, that will depend, in part, on what protection is afforded to accused persons under Philippine law.

The Government and the public plainly have a strong interest in moving forward expeditiously with a grand jury investigation, but on balance the risk of injury to the applicants could well be irreparable and the injury to the Government will likely be no more than the inconvenience of delay. Accordingly, I granted the stay, conditioned upon applicants' filing their petition for certiorari by August 5, 1986. This should permit the Court to act on the petition during its first conference of the coming Term.

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 86-5572

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

(UNDER SEAL),
Defendants-Appellants.

Argued June 5, 1986.

Decided June 18, 1986.

Opinion Issued June 23, 1986.

John M. Bray (Cary M. Feldman, Douglas C. McAllister, Schwalb, Donnenfeld, Bray & Silbert, Washington, D.C., on brief), for defendants-appellants.

Theodore Stewart Greenberg, Asst. U.S. Atty., Alexandria, Va., and David B. Smith, Trial Atty. Washington, D.C., (Justin W. Williams, U.S. Atty., Alexandria, Va. on brief), for plaintiff-appellee.

Before WINTER, Chief Judge, and WIDENER and PHILLIPS, Circuit Judges.

HARRISON L. WINTER, Chief Judge:

Petitioners appeal from an order holding them in contempt for refusing to testify and to respond to a subpoena *duces tecum* before a grand jury, following a statutory grant of use and derivative use immunity. They

contend that the Fifth Amendment affords them the privilege not to testify in the United States, because their testimony could be used to incriminate them in a pending prosecution in the Philippines.

The district court denied petitioners' motion to quash their subpoenas on the basis of the Fifth Amendment, granting instead the government's motion that petitioners be shielded from prosecution in this country by use and derivative use immunity. When petitioners persisted in their refusal to comply with the subpoena, the district court adjudged them in contempt and sentenced them to a period of incarceration to end either when they purged themselves of their contempt or when the term of the grand jury expired. In addition, the court entered a restrictive order with respect to the safekeeping and use of transcripts, records and notes of testimony they might give in response to the subpoenas. Finally, the district court stayed the beginning of sentence for thirty days on condition that petitioners not leave or travel outside the United States.

We affirm.

I.

A grand jury in the Eastern District of Virginia was investigating possible corruption in arms contracts with the Philippines when petitioners, Irene Araneta and her husband Gregorio Araneta, III, respectively the daughter and son-in-law of Ferdinand E. Marcos, former President of the Philippines, came to the United States aboard an aircraft of the United States Air Force.[1] After their arrival in the United States, the Solicitor General of the

[1] In a case of this nature we would ordinarily not disclose the identity of the grand jury which had issued subpoenas or the identity of the persons contesting them. We do so here both because this information is already in the public domain purportedly as a result of disclosure by Mrs. Marcos and because the facts raising the unique legal issue would make identification an easy matter. It is also for these reasons that we did not hear argument *in camera*.

Philippines filed criminal charges against the Aranetas alleging the crimes of conspiracy and violations of the Anti-Graft and Corrupt Practices Act and Articles 210-221 of the Philippines Penal Code during the period 1966 until their departure on February 26, 1986. Approximately two months after their entry into the United States, the Aranetas, having been served with the grand jury subpoenas, appeared before the district court in connection with their motion to quash and the government's motion, pursuant to 18 U.S.C. §§ 6002 and 6003, to immunize them. The district court denied their motion, granted the government's motion and ordered them to testify. When they advised the court that they would persist in asserting the Fifth Amendment privilege and refusing to testify, the district court entered the order finding them in contempt, imposing punishment and protecting their testimony when and if given. The order was entered May 20, 1986.

The United States and the Republic of the Philippines have negotiated and entered into an extradition treaty, dated November 27, 1981. The treaty has not, however, received Senate ratification. By its terms, the treaty applies to certain offenses "committed before as well as after the date this Treaty enters into force." An affidavit of the United States Under Secretary of State for Political Affairs, who is responsible for, *inter alia*, formulating and executing United States foreign policy regarding the Republic of the Philippines, indicates the extreme importance the United States attaches to favorable relations with the Phillipines and declares that it is the policy of the United States to strengthen and broaden those relations. Further, the affidavit shows that the United States has, at the request of the government headed by President Corazon Aquino, agreed to supply the government of the Philippines with an inventory and copies of documents held by U.S. Customs officials, obtained from President Marcos and members of his party when they arrived in Honolulu, Hawaii on February 26, 1986. The

United States undertakes this obligation in order to assist the Philippine government in determining whether valuables and documents brought to the United States by former President Marcos were taken unlawfully and places a high priority on fulfilling this commitment. Finally, the affidavit recites that the Aquino government has established a presidential commission to seek recovery of property and assets claimed by the Republic of the Philippines and that the affiant "strongly believe[s] that it is in the foreign policy interests of the U.S. government to honor the Philippine Government's request [to assist the chairman of the commission in securing access to the documents being held by Customs] and our commitment to fulfill it at the earliest possible time."

After argument of this appeal, one of the lawyers in this case supplied us with a newspaper account reporting that on June 11, 1986, one week after the argument of this case, the United States and the Philippines entered into an agreement on procedures for mutual legal assistance. The accord commits the two signatories to share evidence in the legal investigations of specific corporations and individuals alleged to have provided kickbacks to obtain military and public works contracts, including a $2.1 billion nuclear power plant project. The two governments have also agreed to assist each other in arranging interviews with potential witnesses and locating additional evidence.

Petitioners and other members of the Marcos party are lawfully present in the United States under advanced parole status pursuant to 8 U.S.C. § 1182(d)(5).[2] In

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[2] (5)(A) The Attorney General may, except as provided in subparagraph (B), in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergency reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion

essence, they are present, but not admitted, and may be returned to the Philippines in the discretion of the Attorney General when he determines that their presence no longer serves the public interest.

II.

The Aranetas were granted statutory use and derivative use immunity pursuant to 18 U.S.C. §§ 6002 and 6003, and they concede that this satisfactorily replaces their Fifth Amendment privilege against self-incrimination under the laws of the United States. *See Zicarelli* v. *Investigation Commission*, 406 U.S. 472 (1972); *Kastigar* v. *United States*, 406 U.S. 441 (1972); *Ullman* v. *United States*, 350 U.S. 422 (1956); *Brown* v. *Walker*, 161 U.S. 591 (1896). Instead, they argue that their right not to incriminate themselves has extra-territorial effect, in, that they have a right to refuse to testify in the United States if their testimony could be used to incriminate them under the laws of a foreign jurisdiction, here the laws of the Republic of the Philippines.

No authority controls our resolution of this issue, but *Zicarelli* v. *Investigation Commission*, 406 U.S. 472 (1972) provides the framework for our inquiry.[3] *Zicarelli*

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of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

(B) The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require than the alien be paroled into the United States rather than be admitted as a refugee under section 1157 of this title.

[3] In *Zicarelli*, the Supreme Court granted *certiorari* to determine whether the Fifth Amendment precludes the compulsion of testi-

teaches that a court should first determine that the witness confronts a "real and substantial" risk of foreign prosecution before proceeding to consider whether that witness, if fully immunized under domestic law, may assert a Fifth Amendment privilege on that basis. Accordingly, we first address the degree of danger that the Aranetas will be prosecuted in the Philippines.

While we cannot say with absolute certainty that the Aranetas will face foreign prosecution, we must proceed to the constitutional question if petitioners demonstrate a real and substantial danger of prosecution abroad. Here, petitioners have shown an objectively reasonable expectation of prosecution in the Philippines.

Our conclusion draws support from a method of analysis developed by the Second Circuit, which has addressed this question on several recent occasions. *In re Grand Jury Proceedings*, 748 F.2d 100, 103 (2 Cir. 1984); *In re Gilboe*, 699 F.2d 71, (2 Cir.1983); *In re Grand Jury Subpoena of Flanagan*, 691 F.2d 116, 121 (2 Cir.1982). The *Flanagan* court assembled a series of factors to determine whether a witness faces a cognizable danger of prosecution:

> Whether there is an existing or potential foreign prosecution of him; what foreign charges could be filed against him; whether prosecution of them would be initiated or furthered by his testimony; whether any such charges would entitle the foreign jurisdiction to have him extradicted from the United States;

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mony that could be used to incriminate the witness in the courts of another country. 401 U.S. 933 (1971). The Court ultimately found it unnecessary to decide the issue because Zicarelli failed to establish "a real and substantial fear of foreign prosecution." 406 U.S. at 478. Because the witness could clearly have confined his testimony to areas of interest to domestic law enforcement officials, his fear of foreign prosecution was at best "remote and speculative," obviating the need for any Fifth Amendment protection.

> and whether there is a likelihood that his testimony given here would be disclosed to the foreign government.

691 F.2d at 121. Assessing these factors, we are persuaded that petitioners' fear of prosecution is real and substantial, rather than speculative and remote.

We begin by noting that the government of the Philippines has begun a prosecution against the Aranetas on charges congruent with the subjects comprising the grand jury investigation. Petitioners can reasonably expect to be interrogated on these subjects before the grand jury, raising the very real possibility that petitioners' testimony, or the fruits thereof, would prove useful in the pending prosecution. The government does not dispute this.

Essentially, the likelihood of foreign prosecution really depends on the likelihood that the Aranetas will find themselves under the jurisdiction of the Philippine government either voluntarily or otherwise. In their brief, the Aranetas suggest the possibility that they "may voluntarily choose to return to their country at a future date." Even though they may not return voluntarily, it is not remote or speculative that they may be returned involuntarily. Although the United States is not presently bound by an extradition treaty, such a treaty has been negotiated and signed, subject only to Senate ratification. While the record does not show whether the treaty has been submitted to the Senate, or whether the Senate has simply failed to act, the record clearly reflects the policy of our government to aid and assist the Aquino government in its pursuit of Philippine interests with respect to the Marcos regime. Given this unequivocal commitment, we do not deem either remote or speculative the possibility that, should the Aquino government request the return of the Aranetas and others, the treaty will be ratified, and a request for extradition will be honored.

Even short of ratification of the extradition treaty, the possibility that the Aranetas may be returned to the Philippines is neither remote nor speculative for an additional reason. Petitioners' continued presence in the United States depends wholly on the discretionary authority of the Attorney General. That discretion may be exercised at any time to revoke their right to be present. If revoked, the Aranetas may seek political asylum, and if that is denied, judicial review of the denial. But they would bear a heavy burden in seeking to overturn such denial, and although they might be successful in delaying exclusion, we cannot assume that they would easily prevail on the merits. Again because of the demonstration in the record of the present policy of the United States to aid and assist the present government of the Philippines, we think that there is a substantial likelihood that, if requested by the Aquino government, the Attorney General would revoke the permission of the Aranetas to be present in the United States, and it is not likely that they would be granted political asylum. If that permission to remain in the United States is revoked, there is no question but that the Philippines is the only place to which they may be sent.

Finally, we must determine whether the protective order entered by the district court so reduces the possibility of disclosure as to render inconsequential the risk that the Aranetas' grand jury testimony will be used against them in the Philippines.

The district court, in ordering the Aranetas to testify under a grant of immunity, included provisions pursuant to Fed.R.Crim.P. 6(e) to limit disclosure of any testimony given by them. The order seals the notes and records of petitioners' testimony and provides that no part shall be released except upon court order, the petition therefore to specify to whom it is to be released and the reasons for the release. Access to the testimony is limited to eight federal prosecutorial officials; those persons, and any person receiving any part of the testimony,

are ordered not to divulge any portion to any other person or any foreign government. In addition, the government must maintain a record of the release of ?ing to whom the release is made, the date of release and the date of return. Finally, the order provides that any application for release and the record of any hearing thereon be under seal, and it warns that any violation of the order may be punished as a contempt of court.

The government argues that this order obviates the Aranetas' concern that their immunized testimony might be used against them in a prosecution by the Philippine government, thus precluding the assertion of a Fifth Amendment privilege. The government concedes, however, that it wishes to preserve the option of seeking a court order permitting disclosure to the Philippine authorities, should it be in the interest of the United States to do so.

While some authority holds that a Rule or order may adequately protect against the likelihood of disclosure of grand jury testimony to a foreign government, *see, eg,* In re Nigro, 705 F.2d 1224, 1227 (10 Cir.1982), *cert. denied,* 461 U.S. 927, 103 *S.Ct.* 2087, 77 L.Ed.2d 298 (1983); *In re Baird,* 668 F.2d 432 (8 Cir.1982); *In re Tierney,* 465 F.2d 806 (5 Cir.1972), the facts of this case prove the contrary authority to be more compelling. The allegation against the Marcos family and the strategic importance of American relations with the Philippines have excited an unusual degree of public interest. This is not a simple case charging a garden variety of criminal conduct. Rather, this case involves a former head of state, whose alleged illicit gains are measurable only by the billions of dollars.

We do not suggest that a government official would knowingly violate the order of the district court, but we will not blind ourselves to the tensions that the case has generated which may give rise to an inadvertent disclosure. Moreover, the order protects only against the

disclosure of *testimony*; it does not prohibit the United States from revealing evidence *derived from* the testimony at issue. *Cf. Kastigar, supra.* Certainly the order does not and cannot provide any mechanism to detect a disclosure no matter how inadvertent, and if a disclosure is made, the courts of the United States are powerless to restore secrecy once it is lost. The order also contemplates permitting disclosure at a future date, and we can conceive that court-permitted disclosure may be proper in a number of circumstances. Finally, should the Aranetas testify before the grand jury, and should the grand jury return an indictment, the Aranetas could be called as witnesses at the ensuring trial.

All of these reasons lead us to conclude that the Rule 6(e) order is not adequate to ensure that the testimony of the Aranetas will not be disclosed to the Philippine government. We therefore align ourselves with those courts that have ruled that such an order is not conclusive with respect to possible disclosure. *See In re Grand Jury Proceedings*, 748 F.2d 100, 103-04 (2 Cir. 1984); *In re Flanagan*, 691 F.2d 116, 123-24 (2 Cir.1982); *In re Federal Grand Jury Witness*, 597 F.2d 1166, 1168-69 (9 Cir. 1979) (Hufstedler, J., concurring); *In re Cardassi*, 351 F.Supp. 1080 (D. Conn.1972). We conclude that the Rule 6(e) order cannot reduce the risk of self-incrimination adequately to obviate the necessity of our determining the reach of the Fifth Amendment.

In sum, we are persuaded that the risk of actual prosecution in the Philippines is sufficiently great that we should address the constitutional issue.

III.

By its terms, the Fifth Amendment [4] does not purport to have effect in foreign countries; and ordinarily, unless specifically stated otherwise, a provision of domestic

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[4] No person . . . shall be compelled in any criminal case to be a witness against himself. . .

law, statutory or constitutional, is deemed to apply only to the jurisdiction which enacts it. Thus it seems quite certain that the Fifth Amendment would not prohibit the use of compelled self-incriminatory evidence in a Philippine prosecution if Philippine law countenanced its use. See *Rosado* v. *Civiletti*, 621 F.2d 1119, 1129 (2 Cir.), *cert. denied*, 449 U.S. 856, 101 S.Ct. 153, 66 L.Ed.2d 70 (1980).

To determine whether the Fifth Amendment protects from compelled self-incrimination a witness immunized under domestic law but exposed to a substantial risk of foreign prosecution, we reason by analogy to the extension of the Fifth Amendment to prosecutions under state law. When the Fifth Amendment was applied only to the federal government, the Supreme Court held that the protection it afforded did not forbid the United States from compelling testimony from a witness that would incriminate him under state law, *United States* v. *Murdock*, 284 U.S. 141, 52 S.Ct. 63, 76 L.Ed. 210 (1931), nor did it forbid a state government from compelling testimony that would incriminate under federal law, *Knapp* v. *Schweitzer*, 357 U.S. 371, 78 S.Ct. 1302, 2 L.Ed.2d 1393 (1958). Only when the Fifth Amendment was held applicable to the states, *Malloy* v. *Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964), was the privilege held to protect a witness in state or federal court from incriminating himself under either federal or state law. *See Murphy* v. *Waterfront Commission, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed. 2d 678 (1964).*

From this history, we conclude that the Fifth Amendment privilege applies only where the sovereign compelling the testimony and the sovereign using the testimony are both restrained by the Fifth Amendment from compelling self-incrimination. *See*, Note, The Reach Of The Fifth Amendment Privilege When Domestically Compelled Testimony May Be Used in A Foreign Country's Court, 69 Va.L.Rev. 875 (1983). Since the Fifth Amendment would not prohibit the use of compelled incriminating testimony in a Philippine court, it affords an im-

munized witness no privilege not to testify before a federal grand jury on the ground that his testimony will incriminate him under Philippine law.

The privilege against compulsory self-incrimination serves a dual purpose. It protects individual dignity and conscience, and it preserves the accusatorial nature of our system of criminal justice. In *Murphy, supra,* the Court enumerated the values and aspirations underlying the Fifth Amendment:

> our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown by disturbing him and by requiring the government in its contest with the individual to shoulder the entire load."

378 U.S. at 55, 84 S.Ct. at 1596 (citations omitted). Our decision that the Aranetas cannot find shelter in the Fifth Amendment does not imperil these values. Insofar as the privilege exists to promote the criminal justice system established by our Constitution, it can have no application to a prosecution by a foreign sovereign not similarly constrained. Comity among nations dictates that the United States not intrude into the law enforcement activities of other countries conducted abroad. With regard to insulating the individual from the moral hazards of self-incrimination, perjury or contempt, the United States has done everything in its power to relieve the pressure by granting the Aranetas use and derivative use immunity. Just as comity among nations requires the United States to respect the law enforcement processes of other nations, our own national sovereignty

would be compromised if our system of criminal justice were made to depend on the action of foreign government beyond our control. It would be intolerable to require the United States to forego evidence legitimately within its reach solely because a foreign power could deploy this evidence in a fashion not permitted within this country. Our conclusion in this respect is reinforced by the authorities that hold, as a matter of domestic law, that the Fifth Amendment privilege does not protect the witness against *all* adverse uses of his compelled testimony but only those adverse uses specifically proscribed by the Fifth Amendment. *See Peimonte* v. *United States*, 367 U.S. 556, 559-61, 81 S.Ct. 1720, 1722-23, 6 L.Ed.2d 1028 (1961); *Brown* v. *Walker*, 161 U.S. 591, 597-98, 605-06, 16 S.Ct. 644, 647, 650, 40 L.Ed. 819 (1896); *Ryan* v. *C.I.R.*, 568 F.2d 531, 541-42 (7 Cir. 1977), *cert. denied*, 439 U.S. 820, 99 S.Ct. 84, 58 L.Ed.2d 111 (1978); *In re Daley*, 549 F.2d 469 (7 Cir.), *cert. denied*, 434 U.S. 829, 98 S.Ct. 110, 54 L.Ed.2d 89 (1977); *Childs* v. *McCord*, 420 F.Supp. 428 (D. Md. 1976), *aff'd*, 556 F.2d 1178 (4 Cir. 1977). Our conclusion also accords with the holdings in *In re Parker*, 411 F.2d 1087, 1070 (10 Cir. 1969), *vacated as moot*, 397 U.S. 96, 90 S.Ct. 819, 25 L.Ed.2d 81 (1970); and *Phoenix Assurance Co. of Canada* v. *Runck*, 317 N.W.2d 402 (N.D.), *cert. denied*, 459 U.S. 862, 103 S.Ct. 137, 74 L.Ed.2d 117 (1982).

We reject petitioners' contention that *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964) provides authority for us to hold that the Fifth Amendment does protect against self-incrimination under foreign law.[5] In *Murphy*, the Su-

[5] Some courts have adopted this thesis. *Mishima* v. *United States*, 507 F. Supp. 131 (D. Alaska 1981); *United States* v. *Tracis*, 89 F.R.D. 671 (E.D. Pa. 1981); *In re Cardassi*, 351 F. Supp. 1080 (D. Conn. 1972). The Aranetas also argue that the several decisions, including *Zicarelli* v. *Investigation Commission*, *supra*, holding that a witness failed to demonstrate a real and substantial danger of foreign prosecution have as their underlying premise

preme Court first held that the Fifth Amendment protects a witness against self-incrimination under state and federal law if either jurisdiction compels his testimony. In arriving at this result, Mr. Justice Goldberg discussed English law dealing with the subject, concluding that English law provides protection against self-incrimination under foreign law. The Court's scholarship with respect to English law in this regard has been attacked, *see* Note, 69 Va.L.Rev. at 893-94, and the present English rule *not* to recognize such protection was enacted by Parliament in the Civil Evidence Act of 1968. We do not enter the dispute as to whether *Murphy* represents a correct statement of the English rule at a particular time because we do not think that the *Murphy* holding depended upon the correctness of the Court's understanding of the state of English law and reliance thereon as the sole basis for decision. Rather, *Murphy* proceeds as a logical consequence to the holding in *Malloy* v. *Hogan*, *supra*, that the Fifth Amendment privilege against self-incrimination is fully applicable to the states. *Zicarelli* shows that the English rule, even if it in fact protected against self-incrimination in a foreign jurisdiction was not the basis of decision in *Murphy*. *Zicarelli* was decided on the ground that the witness had not shown that he was in real danger of being compelled to disclose information that might incriminate him under foreign law. Significantly, the Court added:

> Should the Commission inquire into matters that might incriminate him under foreign law and pose a substantial risk of foreign prosecution, and should such inquiry be sustained over a relevancy objection,

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that the privilege would apply if a real and substantial danger of foreign prosecution were established. We cannot read those cases in that manner. We think they proceed only with healthy regard for the principle that constitutional issues not be decided unnecessarily. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 298, 346-47, 56 S.Ct. 496, 482-83, 80 L.Ed. 688 (1936) (Brendeis, J., concurring).

> then a constitutional question will be squarely presented. We do not believe that the record in this case presents such a question.

406 U.S. at 481, 92 S.Ct. at 1676 (footnote omitted). We understand this language to indicate that, as far as the Supreme Court is concerned, the question before us remains an open one. Had it been decided in *Murphy* that the privilege extended to foreign prosecutions, the quoted language in *Zicarelli* would have been unnecessary and *Zicarelli* could have been more simply decided on the settled principle that the privilege extended to testimony that could incriminate the witness under foreign law.

Fully mindful of our obligation to decide only the case before us, we nevertheless feel compelled to note what is not at issue in this case. First, there has been no attempt to show that the United States inspired, instigated or controls the Philippine prosecution. *See United States* v. *Emery*, 591 F.2d 1266, 1267-68 (9 Cir. 1978) (suppressing inculpatory statements made while defendant was in custody of Mexican authorities, where American DEA agents participated by alerting their Mexican counterparts of defendant's wrongdoing, coordinating surveillance, supplying personnel and giving signal triggering arrest); *cf. Lustig* v. *United States*, 338 U.S. 74, 69 S.Ct. 1372, 93 L.Ed. 1819 (1949) (suppressing evidence produced by joint venture of federal and local officers prior to incorporation of Fourth Amendment); *Byars* v. *United States*, 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 520 (1927) (suppressing evidence obtained by federal prohibition agent while assisting local police in search authorized by warrant insufficient under federal constitutional law); *United States* v. *Hensel*, 699 F.2d 18 (1 Cir.), *cert. denied*, 461 U.S. 958, 103 S.Ct. 2431, 77 L.Ed. 1317 (1983) (evidence seized by foreign authorities excluded if (a) circumstances surrounding search and seizure shock judicial conscience; (b) American officials participated in search; or (c) foreign authorities

conducting search acted as agents for their American counterparts); *United States* v. *Rose*, 570 F.2d 1358 (9 Cir.1978) (same); *United States* v. *Morrow*, 537 F.2d 120 (5 Cir. 1976) (same); *Stonehill* v. *United States*, 405 F.2d 738 (9 Cir. 1968), *cert. denied*, 395 U.S. 960, 89 S.Ct. 2102, 23 L.Ed.2d 747 (1969) (same). In addition, petitioners have not suggested that the United States, in compelling their testimony under a grant of immunity, pursues no legitimate purpose of its own, even if it also has an intention to assist a foreign government whose continued good will is of great strategic importance. In short, petitioners have not presented to us a claim of American participation in a foreign prosecution, either actually, through a joint venture with foreign law enforcement officials, or constructively, by means of employing such individuals as agents. The case before us does not require us to address either of these factual patterns, as we expressed no views on them at this time.

AFFIRMED.[6]

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[6] Because the government has not appealed, we have no occasion to consider whether the district court's protective order should be modified in the light of the views that we have expressed. Our affirmance is without prejudice to the right of either party to seek modifications from the district court and without limitation on the district court's discretionary authority to modify for what it deems good cause shown.